Supreme Court, U.S.
FILED

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

VERNON LEON MAXWELL
Petitioner,

v.

THE STATE OF TEXAS,
Respondent

Petition For A Writ Of Certiorari to the Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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31 pp

QUESTION PRESENTED

Whether the Texas Court of Criminal Appeals denial of petitioner's motion for extension of time to file a Petition for Discretionary Review, and the lower courts affirmance of petitioner's conviction violated petitioner's right to effective assistance of counsel, under the U.S. Constitution, Sixth Amendment, made applicable to the states through the Fourteenth Amendment, when:

(1) trial counsel failed to exercise reasonably, objective legal expertise, constituting ineffective assistance of counsel, in advising the petitioner to plea nolo contendere; and

(2) petitioner, acting under erroneous advise of trial counsel, unknowingly and involuntarily plead nolo contendere to the misdemeanor offense of knowingly and intentionally possessing marijuana?

LIST OF PARTIES

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NO._____

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1997

VERNON MAXWELL,
Petitioner,

V.

THE STATE OF TEXAS,
Respondent,

Petition for Writ of Certiorari
To The Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

Petitioner, Vernon Maxwell, praying that Writ of Certiorari be issued to review the judgment and opinion of the Texas Court of Criminal Appeals, issued on August 15, 1997, files this Petition for Writ of Certiorari, saying more particularly in support:

OPINIONS AND JUDGEMENTS ISSUED IN THE COURTS BELOW

On August 15, 1997, the Texas Court of Criminal Appeals denied Vernon Maxwell's motion for extension of time to file a

Petition for Discretionary Review. On August 28, 1997, the Fourteenth Court of Appeals denied petitioner's motion to recall it's mandate. On June 5, 1997, the Fourteenth Court of Appeals affirmed the lower court's decision, holding Vernon Maxwell was not denied effective assistance of counsel, and therefore plead nolo contendere voluntarily and knowingly. This decision is attached hereto as Appendix 3a and Appendix 4a.

JURISDICTION

The Texas Court of Criminal Appeals denied petitioner's motion to for extension of time to file a Petition for Discretionary Review on August 15, 1997. (Appendix 1a, infra). The Fourteenth Court of Appeals denied petitioner's motion to recall mandate on August 28, 1997. A copy of the notice denying such mandate is attached hereto as Appendix 2a. This petition is filed within ninety (90) days of the Texas Court of Criminal Appeals's denial of petitioner's Petition for Discretionary Review. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon 28 U.S.C. § 1257(a), 28 U.S.C. § 2101(d) and Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

This case involves the application of the Sixth Amendment right to effective assistance of counsel, applicable to the States through the Fourteenth Amendment, see ***Gideon v. Wainwright***, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963).

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

> confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defense*. (Emphasis added).

STATEMENT OF THE CASES

On October 30, 1995, Vernon Maxwell entered a plea of nolo contendere, without a plea agreement, to the misdemeanor offense of possession of marihuana, Tex. Health & Safety Code Ann. §481.121(b)(1) (Vernon Supp. 1997),Criminal Case No. 95-36710. Petitioner filed a motion to suppress on October 10, 1995. A motion for discovery was filed on October 18, 1995. This case was heard in Co· nty Court at Law No. 3, Harris County, Texas, Honorable Judge Donald Jackson presiding.

Petitioner's sentencing hearing was held January 29, 1996. A Pre Sentencing Investigation Report formed one basis for the court's sentence. Petitioner was sentenced to one hundred and eighty days (180) days in Harris County Jail. Notice of appeal was filed January 29, 1996.

Petitioner timely filed a motion for new trial on February 28, 1996. Petitioner's motion for new trial was heard on April 2, 1996 and was denied. The Fourteenth Court of Appeals, Harris County, Texas, affirmed the trial court's decision, June 5, 1997, holding that the petitioner had not been denied effective assistance of counsel and therefore plead guilty voluntarily and knowingly.

Petitioner filed a motion to extend time to file a Petition for Discretionary Review with the Court of Criminal Appeals, Austin, Texas. The Court of Criminal Appeals denied petitioners motion on August 15, 1997. The Fourteenth Court of Appeals denied petitioner's motion to recall mandate August 28, 1997.

STATEMENT OF FACTS

Vernon Maxwell was charged with the Class B misdemeanor offense of knowingly and intentionally possessing two or less ounces of marijuana. Tex. Health & Safety Code Ann. §481.121(b)(1) (Vernon Supp. 1997). Vernon Maxwell plead nolo contendere to the Class B misdemeanor offense of possession of marijuana on October 30, 1995. The court found petitioner guilty, and sentencing hearing was held on January 29, 1996. Petitioner was sentenced to one hundred and eighty (180) days in county jail. A Pre Sentencing Investigation Report was considered by the trial court in assessing petitioners sentence. Petitioner appealed his conviction, based on ineffective assistance of trial counsel grounds.

REASON FOR GRANTING THE PETITION

The Constitutional issues arising from the facts in each case where a criminal defendant contends he or she was denied effective assistance of counsel, guaranteed by the Sixth Amendment of the U.S. Constitution and made applicable to the states by the Fourteenth amendment, is an issue of fact and law, which must be viewed on a case by case basis. By virtue that no one case fits neatly into the prescribed standards of what constitutes effective assistance of counsel, there appears to be ambiguity.

QUESTION REINSTATED AND ARGUMENT

Whether the Texas Court of Criminal Appeals denial of petitioner's motion to for extension of time to file a Petition for Discretionary Review, and the lower courts affirmance of petitioner's conviction violated petitioner's right to effective assistance of counsel, under the U.S. Constitution, Sixth Amendment, made applicable to the states through the Fourteenth Amendment, when:

(1) trial counsel failed to exercise reasonably, objective legal expertise, constituting ineffective assistance of

counsel, in advising the petitioner to plea nolo contendere; and

(2) petitioner, acting under erroneous advise of trial counsel, unknowingly and involuntarily plead nolo contendere to the misdemeanor offense of knowingly and intentionally possessing marijuana?

(1) Ineffective Assistance of Counsel

All the Federal Courts of Appeals have held the proper standard for attorney performance is that of a reasonably effective assistance. See *Traprell v. United States*, 725 F.2d. at 151, 152. A guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." *McMann V. Richardson*, 397 U.S. at 770, 771. The measure of an attorney performance is a objective standard of reasonableness under professional prevailing norms. See *Strickland v. Washington*, 466 U.S. at 688.

Trial counsel's legal strategy, in advising Vernon Maxwell's to plea no contest to the charge of knowingly and intentionally possessing marijuana was, at best, ineffective assistance of counsel, and at the very least, incompetent. The objective standard of reasonableness used in deciding legal strategies in *Strickland*, was not applied by trial counsel in the case at bar. The offense report, revealed that a minuscule amount of marijuana was found underneath the floor mat in the front seat of petitioner's vehicle. Trial counsel had information that petitioner had visited San Antonio, Texas, days before, and had loaned his vehicle to friends; there was no odor of marijuana on petitioner's person nor was there any marijuana found on petitioner's person; Vernon Maxwell made no furtive gestures towards the marijuana, he made no inculpatory statement as to ownership of marijuana; and he did not try to flee when stopped by the police. These facts fortify the conclusion that no rational fact finder could have found beyond a reasonable doubt that petitioner knowingly and intentionally possessed marijuana, forming

the basis for his conviction. See *Johnson v. State*, 625 S.W.2d 330, 331 (Tex.Crim.App. 1981); *Humason v. State*, 728 S.W.2d 363, 367 (Tex.Crim.App. 1987); *Collins v. State*, 901 S.W. 2d 503, 505 (Tex.App.--Waco, 1994).

An attorney must have a firm command of the facts as well as the governing law before he can render reasonably effective assistance of counsel. *Ex parte Welborn*, 785 S.W. 2d 391, 393 (Tex.Crim.App. 1990). At the sentencing hearing there were no witnesses called to refute the Pre Sentencing Investigation Report. Trial counsel did not review possible testimony with petitioner prior to the January 29th, 1996 hearing. Trial counsel did not receive a copy of the Pre Sentencing Investigation Report until the day of the sentencing hearing. Trial counsel did not file written motions for continuance for purposes of appeal. Trial counsel did not file written objections to the Pre Sentence Investigation Report, although petitioner had fully satisfied three of four conditions imposed by the court. Petitioner was never called to refute statements of noncompliance in the Pre Sentence Investigation Report.

It may not be argued that a given course of conduct was within the realm of trial strategy unless and until trial attorney has conducted the necessary **legal** and factual investigation which would enable him to make an informed rational decision. *Id.* (emphasis added). Counsel has a duty to bring to bear such skill and knowledge as will render the trial a "reliable adversarial testing process." *Strickland v. Washington*, 466 U.S. at 688. Because reasonably competent trial counsel would have known of that body of case law holding that the evidence as legally insufficient to sustain Petitioner's guilt, a reasonable probability exists that the outcome of the trial would have been different had trial counsel advanced this viable defense on Petitioner's behalf. See *Butler v. State*, 716 S.W. 2d 48, 54-55 (Tex.Crim.App. 1986). Because trial counsel's performance in this regard was both objectively deficient and prejudicial, Petitioner was denied the reasonably effective assistance of counsel. See *Morales v. State*, 910 S.W. 2d 642, 646-647 (Tex.App.--Beaumont, 1995).

A petitioner who seeks to claim that he has been denied the reasonably effective assistance of counsel must first show that his counsel's performance was deficient and that this deficient performance prejudiced the defense to such a degree that he was denied a fair trial, (or as in the instant case, plead involuntarily and unknowingly.) *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The petitioner must establish deficient conduct as well as prejudice by a preponderance of the evidence. *Moore v. State*, 694 S.W. 2d 528, 531 (Tex.Crim.App. 1985). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the trial would have been different. *Jackson v. State*, 877 S.W. 2d 768, 771 (Tex.Crim.App. 1994) The *Strickland* test is the proper standard to be used regarding challenges to guilty plea based on claims of ineffective assistance of counsel. *Ex parte Adams*, 707 S.W. 2d at 649.

In determining whether the Strickland test has been met, counsel's performance must be judged on the totality of representation. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984). Under *Thomas v. State*, 923 S.W. 2d 611 (Tex. App. Houston, Texas [1st Dist] 1995) "Counsel for petitioner had a duty to object to harmful admissible evidence and when she neglected that duty petitioner suffered". In the instant case, trial counsel "promised" petitioner he would receive probation if he plead no contest. Trial counsel failed to investigate evidence purporting the petitioner's innocence. Trial counsel failed to challenge the legality of the search of petitioner's vehicle, the fruits of which would have, in all probability, been suppressed. Trial counsel did not attempt, on the record, to address or object to damaging information in the Pre Sentencing Investigation Report. Trial counsel's approach did not constitute legal strategy, it amounted to ineffective assistance of counsel.

(2) **Voluntarily and Knowingly**

Before a plea of guilty or nolo contendere may be accepted by the trial court, it must be freely and voluntarily made. See Art. 26.13 (b), V.A.C.C.P.; *Ex parte Battle*, 817 S.W. 2d 81, 83 (Tex.Crim.App.

1991). The voluntariness of a guilty plea is determined by the totality of the circumstances. *Munoz v. State*, 840 S.W. 2d 69, 74 (Tex.App.--Corpus Christi, 1992). Vernon Maxwell came to court and signed his plea papers without reading them. Trial counsel told him to merely sign the papers. Petitioner did not discuss with trial counsel preparation for cross examination, or the kind of evidence to "put on".

In attacking a guilty plea on the ground of ineffective assistance of counsel, the essential requisite is a showing that the plea of guilty was unknowingly and involuntarily entered. *Ex parte Adams*, 707 S.W. 2d 646, 648 (Tex.Crim.App. 1986). Petitioner testified that trial counsel did not discuss the Motion to Suppress filed in this case with him. Although a motion to suppress was filed, trial counsel did not seek a hearing on the motion. Additionally petitioner testified during the motion for new trial hearing that he "...did not know that based on the facts of this case there was a distinct possibility that either Judge Jackson or the Court of Appeal could find the evidence insufficient to convict him. Vernon Maxwell testified that had he known of that possibility he would not have plead no contest.

A guilty plea entered, as in the case at bar, without a plea bargain waives all non-jurisdictional defects. *Helms v. State*, 484 S.W. 2d 925, 927 (Tex.Crim.App. 1972). The waiver rule does not apply, however, if the petitioner's guilty plea is not knowingly and voluntarily made and this claim may be raised via motion for new trial or on direct appeal. *Broddus v. State*, 693 S.W. 2d 459 (Tex.Crim.App. 1985).

A defendant's election to plead guilty or nolo contendere when based upon erroneous advice,is not done voluntarily and knowingly. *Ex parte Battle*, 817 S.W 2d at 83. Vernon Maxwell was promised by trial counsel that he would "get probation" if he plead guilty. In addition, trial counsel knew that the offense report revealed that police stopped Petitioner's car for running a red light and that Defendant was arrested after the officer learned of two outstanding warrants for Petitioner from Fort Bend County. The offense report reveals that "officers agreed to tow the defendant's vehicle" which was then and there in a parking lot of a gas station and not posing a hazard to the public. The report noted that an officer, "while looking inside the defendant's vehicle, found one

small plastic bag containing ... marijuana." A marijuana roach and a pipe were later found during what the offense report refers to as an "inventory." Trial counsel did not obtain a ruling on the legality of the search of petitioner's vehicle. As set forth above, trial counsel must have a firm command of the facts and applicable law before he can render the effective assistance of counsel. *Ex parte Welborn*, 785 S.W. 2d at 393.

At the time of Petitioner's plea, it was well settled that the search of Petitioner's car could not have been justified as an inventory, even assuming that the trial court held that the version of events described in the offense report were, in fact, true. See *Fenton v. State*, 785 S.W. 2d 443, 445 (Tex.App.--Austin, 1990) (search of accused's car following traffic arrest was not a lawful inventory search where vehicle was lawfully parked in public parking lot); *Benavides v. State*, 600 S.W. 2d 809, 811-812 (Tex.Crim.App. 1980) (inventory search invalid where petitioner's car was legally parked on street); see also *Autran v. State*, 887 S.W. 2d 31 (Tex.Crim.App. 1994) (Art. I, § 9 of the Texas Constitution provides even greater protection insofar as inventory searches are concerned than the comparable provisions of the Fourth Amendment).

A defendant in a criminal case is entitled to reasonably effective assistance of counsel. *Diaz v. State*, 905 S.W. 2d 302, 307 (Tex.App.--Corpus Christi, 1995). Without effective assistance of counsel, even the educated layman would be lost in the science of law. This right to effective counsel encompasses more than the trial itself; the accused is entitled to reasonably effective assistance during the plea bargaining process as well. See *Ex parte Wilson*, 724 S.W. 2d 72, 73 (Tex.Crim.App. 1987).

Trial counsel's failure to litigate the validity of the search of Petitioner's car was objectively deficient conduct that cannot be sanctioned as trial strategy. See *Cooke v. State*, 735 S.W. 2d 928, 930 (Tex.App.--Houston [14th Dist.], 1987) (failure of trial counsel to move to suppress arrest was deficient conduct). Because the outcome of the proceedings would have been different had trial counsel challenged the

legality of the search of petitioner's vehicle; because the outcome would have different had trial counsel not promised petitioner he would receive probation if petitioner plead no contest; because the outcome would have been substantially different had trial counsel challenged the Pre Sentencing Investigative Report, petitioner was denied reasonable effective assistance of counsel, and relying on such ineffective assistance of counsel petitioner entered a plea of nolo contendere involuntarily and unknowingly. Petitioner should receive a new trial. Tex R.App P.80(b).

CONCLUSION

Vernon Maxwell plead nolo contendere to the criminal offense of knowingly and intentionally possessing marijuana. His plea was not entered voluntarily and knowingly. The totality of circumstances in this case reveal that trial counsel's ineffective assistance so prejudiced the outcome that had petitioner been given of some basic legal guidance, in all probability, the outcome would have been significantly different. Vernon Maxwell would not have plead no contest.

> "... Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issues or otherwise inadmissible. He lacks the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence..." *Powell v. State of Alabama*, 287 U.S. at 68, 69, 53 S.Ct. at 64, 77 L.Ed. at 170.

Petitioner prays this Honorable Court consider each and every question raised herein, to reverse petitioner's conviction, or remand this case to the lower court for a new trial, as the law and justice demands.

Respectfully submitted,

_____

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VERNON LEON MAXWELL

IN THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

VERNON MAXWELL

VS. CAUSE NO. 14-96-0171-CR

STATE OF TEXAS

ORDER

On this 15th day of August, 1997, came on to be considered the motion of the appellant's *counsel* for an extension of time in which to file the Appellant's Petition for Discretionary Review.

AND SUCH MOTION is hereby *denied*.

IT IS SO ORDERED.

PER CURIAM

A TRUE COPY ATTEST [SEAL OF THE STATE OF TEXAS]

Troy C. Bennett, Jr., Clerk
Court of Criminal Appeals

By:/s/Louise Pearson
Louise Pearson, Deputy Clerk

[SEAL OF THE STATE OF TEXAS]
FOURTEENTH COURT OF APPEALS
1307 San Jacinto, 11th Floor
Houston, Texas 77002

August 28, 1997

RE: Case No. 14-96-00171-CR

Style: Maxwell, Vernon Leon
v: The State of Texas

Please be advised that on this date, the Court DENIED motion to recall mandate in the above cause.

T.C. Case # 95-36710

Mary Jane Smart, Clerk

Ronald Wilson
24 Greenway Plaza
Houston, TX 77046

JUNE 5, 1997

[SEAL OF THE STATE OF TEXAS]

JUDGMENT

The Fourteenth Court of Appeals

VERNON LEON MAXWELL, Appellant

NO. 14-96-00171-CR V.

THE STATE OF TEXAS, Appellee

This cause was heard on the transcript of the record of the court below. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment AFFIRMED, that the appellant pay all costs expended in this appeal, and that this decision be certified below for observance.

Affirmed and Opinion filed June 5, 1997.

[SEAL OF THE STATE OF TEXAS]

In The

Fourteenth Court of Appeals

NO. 14-96-00171-CR

VERNON LEON MAXWELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 95-36710

O P I N I O N

Appellant, Vernon Maxwell, entered a plea of nolo contendere, without a plea agreement, to the misdemeanor offense of possession of marihuana. TEX. HEALTH & SAFETY CODE ANN. § 481.121(b)(1) (Vernon Supp. 1997). The trial court found him guilty, and after finding the allegation in an enhancement paragraph true, assessed punishment at ninety days confinement in the Harris County Jail. Appellant filed a motion for new trial, which the court denied. In two

points of error, appellant contends the trial court erred in denying his motion for new trial because he was denied the effective assistance of counsel. We affirm.

Police stopped appellant for running a red light and arrested him after learning of two outstanding warrants for his arrest in another county. While searching his vehicle, the officers found a plastic bag containing marijuana, a marijuana roach and a pipe.

In his first point of error, appellant contends he entered his plea of nolo contendere involuntarily as a result of the ineffectiveness of his trial counsel. When a defendant understandingly and voluntarily enters a plea of guilty or nolo contendere without a plea bargain, he waives all nonjurisdictional error, including deprivations of federal due process, occurring prior to the entry of the plea. *Jack v. State,* 871 S.W.2d 741, 743 (Tex. Crim. App. 1994) (stating the *Helms* rule from *Helms v. State,* 484 S.W.2d 925 (Tex. Crim. App. 1972)). Nevertheless, because the *Helms* rule is predicated on a voluntary plea, it does not apply to bar appeal in cases in which a defendant claims the pleas was involuntary. *Flowers v. State,* 935 S.W.2d 131, 133 (Tex. Crim. App. 1996). Therefore, we may consider appellant's first point of error.

A trial court has discretion in granting a motion for new trial on the ground of ineffective assistance of counsel. *Messer v. State,* 757 S.W.2d 820, 827 (Tex. App. -- Houston [1st Dist.] 1988, pet. ref's). Moreover, the trial court possesses broad discretion in judging the credibility of the witnesses and in weighing the evidence to determine whether a different result would occur upon retrial. *Id.* This court will not disturb a trial court's ruling on a motion for new trial unless the trial court abuses its discretion. *Waller v. State,* 931 S.W.2d 640, 644 (Tex. App. -- Dallas 1996, no pet.).

The proper standard by which we review the adequacy of representation at the guilt-innocence stage of a trial is the two-prong analysis articulated in *Strickland v. Washington,* 466 U.S. 668 (1984). The first prong of *Strickland* requires appellant to demonstrate that counsel's performance was deficient, meaning that counsel's

representation fell below an objective standard of reasonableness based on prevailing professional norms. *Id.* at 687. The second prong requires appellant to demonstrate that the deficient performance prejudiced the defense. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Miniel v. State*, 831 S.W.2d 310, 323 (Tex. Crim. App.), *cert. denied,* 506 U.S. 885 (1992).

Judicial scrutiny of counsel's performance must be highly deferential. *Strickland*, 466 U.S. at 689. A reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id.* An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *McFarland v. State*, 845 S.W.2d 8242, 843 (Tex. Crim. App. 1992), *cert. denied,* 508 U.S. 963 (1993), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9 (Tex. Crim. App. 1994). Counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 670.

Appellant claims he would not have entered a plea of nolo contendere if his trial counsel had informed him that (1) he would receive jail time instead of probation; and (2) a viable defense existed based on the insufficiency of the evidence to support the charge against him. A plea of guilty or nolo contendere must be freely and voluntarily entered regardless of whether the plea was negotiated. *Flowers*, 935 S.W.2d at 133; TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (Vernon 1989). A defendant does not voluntarily and knowingly enter a plea of guilty or nolo contendere if he bases his election upon the erroneous advice of counsel. *Ex parte Battle*, 817 S.W.2d 81, 82 (Tex. Crim. App. 1991). To successfully attack a plea of guilty or nolo contendere on the basis of ineffective assistance of counsel, a defendant must show his counsel's alleged deficiencies caused his plea to be unknowing and involuntary. *Rodriguez v. State*, 899 S.W.2d, 658, 666 (Tex. Crim. App.) *cert. denied*, 116 S.Ct.385 (1995).

Appellant claims Jeffrey Newport, his long time attorney, promised if he entered a plea of guilty, he would get probation.

Newport, however, testified he told appellant that probation was only a possibility. Moreover, appellant admitted the trial court informed him of the range of punishment and imposed certain conditions that he was to perform before sentencing, which included drug testing and rehabilitation, and maintaining contact with the court. Appellant also testified that he understood the trial court had discretion to assess jail time instead of probation if he did not meet these conditions. Appellant participated in drug testing and treatment, but he did not maintain contact with the court while out on bond.

Appellant further claims he would not have entered a plea of nolo contendere if Newport had informed him of the existence of a viable defense based on the insufficiency of the evidence to support the charges against him. Appellant, however, did not bring forth a statement of facts from the plea hearing. *See* TEX.R.APP.P. 50(d). Consequently, we cannot determine from this undeveloped record whether appellant's defense was viable and whether Newport's performance was deficient for failing to inform appellant of such defense. Even if such evidence were available, appellant conceded a jury might have found him guilty on his version of the facts.

Appellant makes additional claims of Newport's deficient performance during the sentencing phase of the trial. Although relevant to our analysis of ineffective assistance, appellant's additional claims do not establish that Newport's alleged deficiencies caused his plea to be unknowing and involuntary. Without more, appellant fails to show that Newport's representation caused him to enter an involuntary plea.

On the other hand, the record affirmatively reflects that appellant's other attorney, James Randall Smith, rendered effective assistance of counsel during the plea process. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 117 S.Ct. 966 (1997). Smith signed seven case reset forms, filed several motions with the trial court including a motion to suppress evidence and a motion for discovery, and represented appellant at a hearing on the motion for discovery, whereas Newport only signed three case reset forms and filed the first notice of appeal. Smith alone signed

appellant's plea form. Although both Newport and Smith were present at the plea hearing, only Smith appeared at the bench with appellant when he entered his plea.

Appellant raised no adverse claims against Smith in his motion for new trial or at the hearing on his motion. Appellant even attested that Smith's representation was effective. On the plea form that appellant and Smith signed, appellant claimed, "I am satisfied that the attorney representing me today in Court has properly represented me and I have fully discussed the case with my attorney .... I have read the foregoing matters and have consulted with my attorney regarding each and every one of them." On the same form Smith attested, "I have consulted with the defendant whom I have found to be competent and to whom I have fully explained all of the matters contained in this instrument." Although appellant claims he did not read the plea form before signing it, Smith's attestation clearly indicates that he explained all of the matters on the form to appellant. Furthermore, appellant brings no adverse claims against Smith on appeal. The trial court did not abuse its discretion in denying appellant's motion for new trial. Appellant's first point of error is overruled.

In his second point of error, appellant contends he was denied the effective assistance of counsel because trial counsel failed to (1) challenge the legality of the inventory search of his car; (2) seek a hearing or a ruling on a motion to suppress evidence; and (3) explain to him the likelihood that a court would grant the motion to suppress. Had trial counsel made him aware of the probability of success on the motion, appellant contends, he would not have entered the plea of nolo contendere.

The record reflects that Smith, and not newport, filed the motion to suppress and alleged, on appellant's behalf, that "the search and seizure conducted in this case was illegal and without probable cause, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Article I, Section 9 of the Texas Constitution, and Article 38.22 and 38.23 C.C.P. [sic]." Smith, however, did not state in what manner the search was illegal, or support his general allegation

with any law or facts. Although Smith requested a ruling and a hearing on the motion, the trial court did not rule or set a hearing on the motion.

The record, nevertheless, does not reflect that either Smith or Newport rendered ineffective assistance by failing to challenge the legality of the inventory search of appellant's car. Appellant relies on a police offense report to support his allegation that the inventory search of his vehicle was illegal because impoundment of his vehicle following his arrest was unlawful. In inventory search of a vehicle is permissible under the state and federal constitutions only if conducted pursuant to a lawful impoundment. *Mayberry v. State*, 830 S.W.2d 176, 179 (Tex. App. -- Dallas 1992, pet ref'd). Appellant concedes the report states that officers arrested appellant on two outstanding warrants. When an officer makes a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile and containers within the passenger compartment. *Dotson v. State*, 692 S.W.2d 568, 569-70 (Tex. App. -- Houston [14th Dist.] 1985, no pet.) (citing *New York v. Belton*, 453 U.S. 454 (1981).

Moreover, the policy offense report is not in the record before this court, and appellant fails to refer us to any portion of the record that supports his allegation. Without a more developed record, we cannot determine whether the search was unlawful. Without a developed record reflecting an unlawful search, we cannot determine whether trial counsel's performance was deficient for failing to challenge the legality of the search or whether trial counsel's failure to inform appellant of the probability of success on the motion to suppress rendered appellant's plea involuntary. *See* TEX. R. APP. P. 50(d). Appellant's second point of error is overruled.

Accordingly, the judgment of the court below is affirmed.

PER CURIAM

Judgment rendered and Opinion filed June 5, 1997.

Panel consists of Justices Yates, Hudson, and Fowler.

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